and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further.

We are of opinion that the court below did not err in refusing the instructions asked by plaintiffs in error and giving the instructions set out above. Nor did the court err in refusing plaintiffs in error a new trial, therefore its judgment is affirmed. *Affirmed.*

KEITH, P., and RIELY, J., dissent.

NOTE.—The question of construction involved in the principal case is an extremely nice one. Judge Cardwell's opinion indicates a thorough study of the case, and to us is most convincing. The opinion is a valuable contribution to the law of principal and surety.

It does not appear upon what grounds the dissent of Keith, P., and Riely, J., is based. In the absence of a statement of the reasons for their dissent, the opinion of the majority will very generally commend itself to the profession.

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## FLORANCE, TRUSTEE, v. MORIEN AND OTHERS. *

*Supreme Court of Appeals:* At Richmond.

January 25, 1900.

1. APPEAL AND ERROR—*Amount in controversy—Taxes—Title to land.* The right to subject land to the lien thereon for taxes is not a controversy concerning the title to the land, and if a decree for such taxes amounts to less than $500, no appeal lies therefrom to this court.

2. APPEAL AND ERROR—*Record.* Papers upon which a cause was not heard in the trial court constitute no part of the record of the cause, and cannot be considered in this court.

3. DEEDS—*Description—Notice—Registry.* If property conveyed be so described or identified in the conveyance that a subsequent purchaser or encumbrancer would have the means of ascertaining with accuracy what and where it is, and the language be such that, if he should examine the instrument itself he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it, the description is sufficient, and the registry of such conveyance operates as constructive notice to subsequent purchasers or encumbrancers.

Appeal from a decree of the Circuit Court of Henrico county pronounced June 17, 1899, in a suit in chancery, wherein the appellant, John R. Morien, was the complainant, and the appellant, R. R. Florance, trustee, and others were the defendants. *Affirmed.*

* Reported by M. P. Burks, State Reporter.

In lieu of certifying the records of the trial court, this cause is heard in this court under the following agreement of all the parties:

"It is agreed by and between counsel for all parties in the above styled cause that the following case be stated for the consideration of the Supreme Court of Appeals of Virginia, presenting two questions of law for review, with which the greater part of the papers in the case have nothing to do and which are accordingly by consent not transcribed or presented further than appears herein.

"On March 10th, 1898, John R. Morien filed his bill in the Circuit Court of Henrico county alleging that he was the son and one of the heirs-at-law of Richard Morien, deceased, who had died several years before, leaving him surviving a widow and five children, and seized and possessed of certain real estate located partly in the county of Henrico and partly in the city of Richmond; that by certain partition proceedings previously had in the Circuit Court of Henrico county much of this estate had been disposed of, certain portions of it being assigned to said widow as her dower right in the estate of her said husband; that on the —— day of January, 1898, the said widow and life tenant died, her dower interest thereby coming to an end and the property devolving at once in remainder upon the said children of said Richard Morien.

"The bill further charged that Richard K. Morien, one of the children of said Richard Morien, deceased, on November 8th, 1889, gave a deed of trust in which his wife united to secure the Richmond Perpetual Building, Loan and Trust Company for moneys due it, the property conveyed by said deed being, first, a house and lot belonging to said Richard K. Morien on the south-east corner of Cary and Meadow streets, in the county of Henrico; and second, 'all the right, title and interest of said Richard K. Morien and wife in and to the real estate lying in the county of Henrico of which Richard Morien died seized and possessed, together with any and all other real estate which they may own, and any and all right, title and interest which they may have in and to any and all real estate in said county of whatever kind or wheresoever the same may be, or however acquired by said Richard K. Morien and wife.' It was further charged that at a sale under said deed of trust the Richmond Perpetual Building, Loan and Trust Company bought as well the property specifically described in said deed as the undivided share of said Richard K. Morien in said dower property, but that said Richard K. Morien had afterwards, to wit: on the 24th day of February, 1898, given a deed of trust upon his undivided interest in said estate to R. R. Florance, trustee, to secure to Addie Hayes the payment of the sum of $1,112.00, and to Boyce D. Brooker the sum of $68.00. The prayer of the bill was in the usual form for a partition of the property which was divisible in kind, and for a sale of such as was not divisible, and a distribution of the proceeds according to the respective rights of the parties.

"It is further agreed that Richard Morien, the father of said John R. Morien, died seized and possessed of other real estate in Henrico county than the property described in said bill, which property so described consisted of, first, the old homestead premises in Henrico county, near the corporate limits of Richmond, on the south side of Cary street at its intersection with Ritchie street; and, second, certain islands in James river, near the new pump house, known as Cedar Islands, and containing about ten acres of land; and that said Richard K. Morien

was interested in several pieces of real estate in said county in addition to the property above described at the time that he made said deed of trust to the trustees of said Building, Loan and Trust Company.

"Answers were duly filed by certain of the defendants, among them said Loan and Trust Company, admitting the allegations of the bill, and alleging the purchase by it of said undivided interest of said Richard K. Morien at a sale under said deed of trust and asserting its title to same. An answer was also filed by said R. R. Florance, trustee, averring the lack of actual notice to him of said deed of trust from Richard K. Morien to the trustees of said Loan and Trust Company at the time of the conveyance to him as aforesaid, and alleging that in consequence of the vague and indefinite description to the property in the deed to said company's trustees, its recordation constituted no notice to him or his beneficiaries, and that they were consequently purchasers for value of said Richard K. Morien's interest in said property, and without notice of any prior lien or claim upon it. Said lack of actual notice to said Florance is also conceded by counsel for said company.

"By decree of May 21st, 1898, the cause having been duly matured, was referred to a commissioner of said Circuit Court of Henrico county. In the course of proceedings had before him it appeared among other things that a large amount of State and county taxes upon said property which had accrued during said life tenancy was unpaid and stood upon the tax books as a charge against the same, being listed in the name of "Richard Morien's heirs." On December 21st, 1898, the commissioner filed his report, to which exception was duly taken on two grounds, namely:

"*First.* Because of his finding that the real estate in suit was liable in the hands of remaindermen for taxes accrued thereon during the life tenancy; and

"*Second.* Because of his finding that said deed of trust from said Richard K. Morien to the trustees of said company gave constructive notice to said Florance, trustee, of the conveyance of the undivided interest of said Richard K. Morien in said dower property, and that the deed to said Florance, trustee, was therefore postponed to the claim of said Richmond Perpetual Building, Loan and Trust Co.

"Said Circuit Court, however, overruled these exceptions and, on June 17th, 1899, entered a decree confirming the report as follows:

"'This day this cause came on to be again heard upon the papers formerly read, and upon the exceptions to the report of Commissioner W. H. Sands heretofore filed, and was argued by counsel.

"'On consideration whereof, the court being of opinion that the real estate in suit is, notwithstanding sec. 661 of the Code, liable in the hands of the plaintiff and his co-tenants for the taxes which accrued thereon during the lifetime of their mother, Mrs. Elizabeth Morien, the life-tenant, who was responsible for the payment of same, it is accordingly so decided; and the court being further of opinion that the trust deed given by Richard K. Morien to secure the Richmond Perpetual Building, Loan and Trust Company was sufficient in law to charge subsequent purchasers with notice of same, it is considered that R. R. Florance, trustee, must be deemed to have had knowledge of said first-mentioned conveyance, and that he took said property subject to the lien thereof.

"'The court doth therefore overrule both said exceptions and confirm the report of Commissioner Sands aforesaid.

"'But counsel for R. R. Florance, trustee, having expressed a purpose to apply for an appeal from this decree, execution of same is suspended for a period of ninety days. And said Florance being a fiduciary, he is not required to give any bond on account of this suspension order.

"'Copy of decree, &c.'"

*A. W. Patterson* and *George Bryan*, for the appellants.

*Attorney-General A. J. Montague* and *William Ellyson*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The first assignment of error is that the Circuit Court erred in holding that the real estate sought to be partitioned was liable in the hands of the heirs of the decedent and those who held under them for the State and county taxes remaining unpaid with which it had been assessed during the lifetime of his widow, to whom it had been assigned as dower.

It does not appear that the taxes in controversy, either to the State or county, amount to the sum of $500. This court is, therefore, without jurisdiction so far as the decree complained of is in favor of the Commonwealth and the county of Henrico, unless the title to the real estate is drawn in question, as appellants contend. It does not appear, as counsel for appellants insist, that the Auditor had become the purchaser of the land upon the failure of the life tenant to pay the taxes, and that the Commonwealth's title thus acquired is drawn in question. The certificate of the clerk of the County Court of Henrico county stating that there had been such a sale cannot be considered here, as it is not part of the record upon which the case was heard in the Circuit Court.

Taking advantage of the wise provisions of sec. 3460 of the Code, the parties agreed such facts and brought up such portions of the record only as they thought sufficient to enable this court properly to decide the case. The record so made up shows that, in the course of the proceedings before the commissioner to whom the case had been referred, it appeared and he reported "that a large amount of State and county taxes upon said property which accrued during said life-tenancy" (of the widow) "was unpaid and stood upon the tax books as a charge against the same, being listed in the name of 'Richard Morien's heirs'"; that his report was excepted to because of his finding that the real estate was liable in the hands of the remainderman

for taxes which accrued during the life tenancy; that the decree of the court overruled that exception and held that the land was "liable in the hands of the plaintiff and his co-tenants for the taxes which accrued thereon during the lifetime of their mother. . . . ."

From these facts, and they are substantially all that are disclosed by the record filed in this court as to the controversy between the appellants and the Commonwealth and county of Henrico, it is clear that the question raised in the Circuit Court and decided by it was as to the lien of the taxes upon, and not as to the title of the appellants to, the land, and that this court is without jurisdiction to review the decree so far as it is in favor of the Commonwealth and the county of Henrico (*Umbarger* v. *Watts*, 25 Gratt. 167; *Hartsook's Adm'r* v. *Crawford's Adm'r*, 85 Va. 413); and as to them the appeal must be dismissed as improvidently awarded.

The second and remaining assignment of error is to the action of the court in holding that the deed of trust executed by Richard K. Morien to secure the Richmond Perpetual Building, Loan and Trust Company had priority over the deed of trust executed by him to R. R. Florance, trustee, to secure certain other creditors.

The ground of this contention is that the description of the land in the first-named deed of trust is not sufficient to charge subsequent purchasers with notice under the registry laws.

The description of the lands conveyed by the prior deed of trust is as follows: First, a house and lot, belonging to said Richard K. Morien, on the south-east corner of Cary and Meadow streets, in the county of Henrico; and second, "all the right, title and interest of said Richard K. Morien and wife in and to all the real estate lying in the county of Henrico of which Richard Morien died seized and possessed, together with any and all other real estate which they may own and any and all right, title and interest which they may have in and to any and all real estate in said county, of whatever kind or wheresoever the same may be or however acquired by the said Richard K. Morien and wife." The junior deed of trust embraced all of Richard K. Morien's interest in his father's estate, and it is agreed that Florance, trustee, had no actual notice of the prior deed of trust. The commissioner to whom the case was referred reported that "the deed to the trustees of the Richmond Perpetual Building, Loan and Trust Company describes the property with sufficient accuracy to enable any and all parties interested to ascertain what interest, if any, passes thereunder; in fact, the description is almost identical with

the Florance deed. It locates the property in Henrico county, and as the interest of Richard K. Morien in the real estate of his father, Richard Morien, in said land." The commissioner's report was excepted to "because of his finding that said deed of trust from said Richard K. Morien to the trustees of said company gave constructive notice to said Florance, trustee, of the undivided interest of said Richard K. Morien in said dower property, and that the deed to said Florance, trustee, was, therefore, postponed to the claim of said Richmond Perpetual Building, Loan and Trust Co." The court overruled that exception, and held that the prior deed of trust was sufficient to charge Florance, trustee, with notice.

From the commissioner's report and the exception to it, it appears that the controversy in this case between the trust creditors is over the property described in the prior deed of trust as "all the right, title and interest of said Richard K. Morien and wife, in and to the real estate lying in the county of Henrico of which Richard Morien died seized and possessed." Is that description sufficient to give notice to subsequent purchasers under the registry laws?

The object of the registry laws is to compel every person receiving an instrument required to be registered to place it upon the records in order that he may thereby protect his own rights as well as those who may afterwards acquire an interest in the same property. The recorded instrument is sufficient to operate as constructive notice under the registry laws if the property be so described or identified that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what and where it was, and the language used be such that, if he should examine the instrument itself, he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it. 2 Pom. Eq. Jur., secs, 649, 654; 2 Minor's Inst. 977 (4th Ed.); 2 Devlin on Deeds, sec. 650; *Le Neve* v. *Le Neve*, 2 W. & T. Lead. Cases, pt. 1, p. 205 and notes.

The deed in this case shows from whom the property in controversy was derived or acquired, in what county it was located, and that all the grantor's right, title and interest therein was intended to pass by it for the purposes for which it was executed. No subsequent purchaser or encumbrancer could have read that deed without obtaining actual notice of all the rights which the beneficiary under it is now asserting.

We are of opinion, therefore, that it was sufficient in law to charge subsequent purchasers with notice thereof and that the appellant,

Florance, trustee, must be deemed to have had notice of it and to take subject to the lien thereof.

The decree appealed from must be affirmed. *Affirmed.*

NOTE.—The only point of special interest in this case is the ruling that a deed conveying "all the right, title and interest of R. V. M. and wife, in and to the real estate lying in the county of Henrico, of which R. M. died seised and possessed," and duly recorded, contains a sufficient description of the property to put subsequent purchasers on notice, under the registry laws.

In *Mundy* v. *Vawter*, 3 Gratt. 518, 545, the more indefinite description, "all the estate both real and personal to which J. is in any manner entitled at law or in equity," was held to be sufficient as between the parties, but insufficient as constructive notice under the registry laws. The principle that conveyances may be good between the parties, but insufficient as notice under the registry laws by reason of indefiniteness of description, is generally recognized. See Devlin on Deeds (1st ed.), 650–651. There seems to be little uniformity of decision as to what constitutes a sufficient description of real estate in order to pass title as between the parties. In chapter 29 of the volume above cited, Mr. Devlin has made a voluminous collection of instances of descriptions which have come before the courts.

The practice adopted in this case, of agreeing the facts, under the provisions of sec. 3460 of the Code, instead of taking the whole record up, is commended by the court, and in the interest of economy ought to become general.

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## VIRGINIA & NORTH CAROLINA WHEEL CO. v. CHALKLEY.*

*Supreme Court of Appeals:* At Richmond.

February 1, 1900.

Absent, *Harrison*, J.

1. EVIDENCE—*Defective machinery—Condition subsequent to injury—Negligence.* In an action by a servant to recover damages for a personal injury resulting from alleged defects of machinery, evidence of repairs to the machinery after the injury is not admissible to show negligent failure to repair before the injury, but if the defendant offers evidence of good condition after the injury, the plaintiff may rebut it by evidence to disprove that fact, or may show subsequent repairs.
2. EVIDENCE—*Cross-examination—Extent of.* A witness may be asked on cross-examination any question touching his examination in chief which tends to test his accuracy, veracity or credibility.
3. MASTER AND SERVANT—*Safe machinery—Inspection—Repairs—Ignorance of defects—Ordinary care.* While it is the duty of the master to use ordinary care to provide reasonably safe, sound and suitable machinery for the use of his servant, and to examine and inspect the same from time to time, and to

*Reported by M. P. Burks, State Reporter.